No. 22687

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. BUMB, as Trustee in Bankruptcy for the Estate of Thompson Electric Co., Bankrupt,

Appellant,

vs.

VALLEY ELECTRIC COMPANY, a California corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal from Findings of Fact, Conclusions of Law and Judgment thereon made and entered by the Honorable Manuel Real, United States District Judge, on December 29, 1967, in the matter below, adjudging and decreeing that appellant and plaintiff below take nothing by said action.

I.
JURISDICTIONAL STATEMENTS.

On or about March 2, 1967, upon being duly authorized by the Referee so to do, appellant, as Trustee in Bankruptcy for the Estate of Thompson Electric Co., Bankrupt, filed a plenary action in the United States District Court, Central District of California, being Civil Action No. 67-315-R [R-2].

Appellee, Valley Electric Company, a California corporation, filed its answer to appellant's complaint on or about April 4, 1967 [R-5].

The matter proceeded to Pre-Trial Conference pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of said District Court and a Pre-Trial Conference Order was duly entered on November 6, 1967 [R-10].

The matter was tried before the District Court, without a jury, on December 14 and 15, 1967, and the Court, pursuant thereto, on December 29, 1967, made and entered its Findings of Fact and Conclusions of Law and Judgment [R-78].

Within the time allowed by law, your appellant filed a Notice of Appeal [R-86], and your appellant has taken the steps required by law in presenting the necessary record on the within appeal.

The jurisdiction of the Court of Appeals is invoked pursuant to Title 11 U.S.C. Section 1291.

II.
STATEMENT OF FACTS.

On March 2, 1967, appellant, as Trustee in Bankruptcy for the Estate of Thompson Electric Co., Bankrupt, filed his complaint in the United States District Court against appellee, Valley Electric Company, a California corporation, seeking recovery of certain alleged voidable bankruptcy preferences under Section 60 of the National Bankruptcy Act [Title 11 U.S.C. §96].

Said complaint alleges that the appellee received certain alleged voidable preferences, as follows:

(1) On February 11, 1965	$18,000.00
(2) On March 11, 1965	$30,000.00
(3) On April 12, 1965	$20,000.00
Total	$68,000.00

After pre-trial and the entry of a rather lengthy Pre-Trial Conference Order the matter was tried without a jury and the Court entered its Findings of Fact and Conclusions of Law and Judgment, which said Judgment adjudged and decreed that appellant take nothing by said action.

Said Judgment was predicated upon the Findings of Fact that two of the three original petitioning creditors in the involuntary bankruptcy proceedings were not, in fact, creditors and therefore the adjudication was void, and therefore plaintiff and appellant had no standing to sue the defendant and appellee. Said judgment is based on the further findings that Thompson Electric Co. was not "bankrupt" and was not insolvent on the dates of the alleged preferences, and that appellee did not know or have reasonable cause to believe the bankrupt was insolvent. Said judgment is further predicated on the finding that appellee did not receive or obtain a greater percentage of its claim than have or will some other creditor of the same class.

III.
SPECIFICATION OF ERRORS.

The judgment of the United States District Court is erroneous in that the same is based upon the following erroneous Findings of Fact, to wit:

(1) Said petition alleged that at the time said petition was signed and sworn to on June 8, 1965, and at the time said petition was filed on June 10, 1965, the alleged bankrupt, THOMPSON ELECTRIC CO., was indebted to J. B. ALLEN CO., a California corporation, in the sum of $33,523.79. On said dates, said THOMPSON EECTRIC CO. was not indebted to J. B. ALLEN CO. in any amount or at all, but in fact, on said dates, J. B. ALLEN CO. was indebted to THOMPSON ELECTRIC CO., the alleged bankrupt.

(2) On said date, THOMPSON ELECTRIC COMPANY was not indebted to J. W. BAILEY CONSTRUCTION CO. in any amount or at all, but in fact, on said dates, J. W. BAILEY CONSTRUCTION CO. was indebted to THOMPSON ELECTRIC CO.

(3) The aforesaid allegations supporting said petition in bankruptcy were each untrue. Neither J. B. ALLEN CO. nor J. W. BAILEY CONSTRUCTION CO. was a creditor of the alleged bankrupt, THOMPSON ELECTRIC CO., either at the time when said petition was signed, or at the time when said petition was filed.

(4) Neither J. B. ALLEN CO. nor J. W. BAILEY CONSTRUCTION CO. were creditors of THOMPSON ELECTRIC CO. at the time said petition was filed. The appointment of plaintiff as trustee was based upon the adjudication based upon the petition filed by persons who were not in fact creditors.

The adjudication in bankruptcy and the appointment of plaintiff as trustee were in a proceeding initiated on the basis of statements that said J. B. ALLEN CO. and J. W. BAILEY CONSTRUCTION CO. were creditors of THOMPSON ELECTRIC CO., which statement were untrue.

(5) THOMPSON ELECTRIC CO. was not bankrupt on February 1, 1965, and was not bankrupt at all times from and after February 1, 1965. On said date of February 1, 1965, the aggregate of the liabilities of THOMPSON ELECTRIC CO. did not exceed the aggregate of its assets at fair valuation.

(6) At the time the payments were made on February 11, 1965, March 11, 1965 and April 12, 1965, THOMPSON ELECTRIC CO. was not insolvent.

(7) At the time said payments were made the defendant did not know, nor did the defendant have reasonable cause to believe, that THOMPSON ELECTRIC CO. was insolvent.

(8) Except for the sum of $3,425.01 due to RABER SUPPLY COMPANY for merchandise delivered in March 1965 and its obligation to VAL-

LEY ELECTRIC COMPANY, THOMPSON ELECTRIC CO. paid all of its obligations as they fell due during the period from January 1, 1965 to May of 1965.

(9) It is not true that defendant received a greater percentage of its claim than have or will some other creditor.

Said judgment is further erroneous in that the same is entered in accordance with the following erroneous conclusions of law, to wit:

1. That payments made by THOMPSON ELECTRIC CO. to defendant did not enable defendant to obtain a greater percentage of its debt than some or any other creditors of the same class. That such payments did not constitute preference. That defendant was not preferred.

2. That the adjudication that THOMPSON ELECTRIC CO. was a bankrupt, which adjudication was dated July 29, 1965, was upon a petition filed by persons who were not creditors of THOMPSON ELECTRIC COMPANY. Therefore, said adjudication was without the jurisdiction of the court and, therefore, void.

3. That the appointment of plaintiff as trustee of the estate of THOMPSON ELECTRIC CO. was, therefore, void and all proceedings carried on herein by plaintiff in such capacity were void.

IV.
SUMMARY OF ARGUMENT.

A. J. B. ALLEN CO. AND J. W. BAILEY CONSTRUCTION CO. WERE PROPER PETITIONING CREDITORS CONTRARY TO THE DISTRICT COURT'S FINDINGS.

B. IT IS IMMATERIAL WHETHER OR NOT J. B. ALLEN CO. AND J. W. BAILEY CONSTRUCTION CO. WERE VALID PETITIONING CREDITORS AS THE DISTRICT COURT CANNOT COLLATERALLY ATTACK THE ADJUDICATION IN BANKRUPTCY.

C. THE DISTRICT COURT'S PREOCCUPATION WITH THE VALIDITY OF THE ADJUDICATION IMPROPERLY INFLUENCED IT TO DISREGARD THE EVIDENCE PRESENTED ON THE PROPER ELEMENTS TO BE CONSIDERED IN A PREFERENCE ACTION.

(1) THE EVIDENCE CONCLUSIVELY SHOWED THAT THOMPSON ELECTRIC CO. WAS INSOLVENT AT ALL TIMES FROM AND AFTER JANUARY 1, 1965.

(2) THE UNCONTRADICTED EVIDENCE SHOWED THAT APPELLEE KNEW OR HAD REASONABLE CAUSE TO BELIEVE THAT THOMPSON ELECTRIC CO. WAS INSOLVENT.

(3) APPELLEE, AS A RESULT OF THE TRANSFERS COMPLAINED OF RECEIVED AND OBTAINED A GREATER PERCENTAGE OF ITS CLAIM THAN HAS SOME OTHER CREDITOR OF THE SAME CLASS.

V.
ARGUMENT.

Introduction.

Appellant will attempt to point out hereinbelow the reasons why the aforesaid Findings, Conclusions and Judgment should be reversed and why appellant should have judgment for $68,000.00 against the appellee.

It is submitted that a review of the evidence produced at the trial, including the Pre-Trial Conference Order with its admitted facts and exhibits conclusively shows that all elements of a voidable bankruptcy preference were proven by the trustee and that the findings of the district court on these points are "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

The District Court's preoccupation with the proposition that the original involuntary petition was improperly filed because two of the three petitioning creditors were not in fact creditors dominated the entire course of the trial proceedings. This thinking of the District Court, which was finally manifested in its conclusion of law that the adjudication in bankruptcy and the appointment of appellant as trustee were "void", persisted throughout the proceedings and even in spite of direct authority cited by appellant to the contrary. No authority was cited by appellee on this subject nor did the District Court indicate what authority it was relying on nor why it chose to completely ignore the authorities cited by appellant which, it is submitted, were squarely in point.

Appellant respectfully submits that it is evident from the record that this preoccupation improperly influenced

the District Court to overlook or ignore the evidence presented on the true issues of whether or not there was a preference. The Court's questioning of counsel for appellant, it is submitted, reflects that the District Court did not apply the proper test for insolvency and engaged in various assumptions as to what would be the case if debts were forgiven by creditors, and at one point applied the state law test of insolvency. The District Court also, apparently, chose to ignore the admissions of fact contained in the Pre-Trial Conference Order itself which was also introduced into evidence. The admissions of fact in the Pre-Trial Conference Order admit insolvency and the only issues of fact specified did not include the issue of insolvency or whether the involuntary was properly filed in the first place.

A. J. B. Allen Co. and J. W. Bailey Construction Co. Were Proper Petitioning Creditors Contrary to the District Court's Findings.

J. B. Allen Co. was the general contractor on a certain work of improvement, and Thompson Electric Co. was the electrical subcontractor. In the subcontract Thompson Electric Co. promised to pay for all its labor and materials on said job. The testimony of Allen Wallace was that at a meeting in May, 1965, Thompson informed J. B. Allen that it could not complete the job and that it owed material bills of $33,523.79 and was ceasing all operations.

At this point it was known by Allen that it would have to pay these material bills at some point in time.

As to J. W. Bailey Construction Company the above relationship was the same although a stop notice had actually been filed prior to bankruptcy by Raber Supply

Co., Inc., *and* Bailey had paid $842.24 in wages to Thompson's employees.

Section 59(b) of the Bankruptcy Act [Title 11 U.S.C. §95(b)] provides that "Three or more creditors who have provable claims not contingent as to liability —amounting in the aggregate to $500.00—" may file an involuntary petition in bankruptcy against a person.

This section of the Act was amended in 1962. As stated by the author in Vol. 3, Collier on Bankruptcy §59.14(2) at pages 599 and 600:

> "The amendment of 1962, which brings the section to its present reading, does not affect the status of a petitioning creditor who has merely a contingent claim. Such a claim is still insufficient. What the amendment does is to eliminate the requirement that the claim be liquidated—"
>
> "Under the section as it now reads, there should be no hesitation about allowing a holder of an unliquidated claim to be one of the necessary petitioning creditors whenever it is clear that the aggregate amount of claims is $500.00 or more."

Both J. B. Allen and J. W. Bailey had claims which were no longer contingent when it was learned in May of 1965 that Thompson Electric was closing its doors and, in breach of the subcontracts, would not complete its work for Bailey and Allen. True, J. B. Allen's claim did not become liquidated until the stop notice was filed (after bankruptcy) but its claim was certainly not contingent at the time the involuntary was filed on June 10, 1965, for the subcontract had already been breached by Thompson as was the case with the subcontract with J. W. Bailey; and Bailey had already been served with

a stop notice and had been required to pay wages of Thompson's crew so that their claim was not only not contingent but was also liquidated prior to bankruptcy.

As stated in the Senate Report recommending the passage of the 1962 Amendment, which said report is set out in this Court's decision of *In re Coldiron and Peeples Oil Company* (9th Cir. 1966) 356 F. 2d 266:

> "As it presently reads, Section 59b forecloses a creditor with a large unliquidated claim—e.g. *one for breach of contract*—from joining in a petition, although it can be made abundantly clear that his claim exceeds the statutory minimum of $500.00." (Emphasis added).

B. It Is Immaterial Whether or Not J. B. Allen Co. and J. W. Bailey Construction Co. Were Valid Petitioning Creditors as the District Court Cannot Collaterally Attack the Adjudication in Bankruptcy.

Not only were not J. B. Allen and J. W. Bailey parties to the action below so that the Court could not make an adverse determination as to their claims, but such a determination has no bearing at all in a plenary preference action.

The involuntary petition was filed on June 10, 1965, and pursuant to a *Consent* filed by the alleged bankrupt, it was adjudicated a bankrupt. That Order of Adjudication became final and no Review or Appeal was taken therefrom.

The only person that *could* have appealed the adjudication was the bankrupt itself or its stockholders and *it had consented* to the entry of the Order.

Section 18(b) [Title 11 U.S.C. §41(b)] as amended by the 1938 Act sets forth who may defend an involuntary petition as:

> "The bankrupt and, in the case of a petition against a partnership, any general partner—"

As stated in *Vol. 2 Collier on Bankruptcy,* §18.33 at pages 91 and 92.

> "Under §18 as originally enacted in 1898, creditors could intervene under §18b and oppose a petition in involuntary bankruptcy. This rule was designed to protect creditors whose interest might be affected by the adjudication. The Act of 1938, however, provided that creditors may no longer intervene in opposition to an involuntary petition."

It therefore follows that if the bankrupt is the only one who can contest the involuntary petition, the bankrupt is the only one that could attack the adjudication. In the instant case, however, the bankrupt consented to the entry of the Order of adjudication and would be estopped from attacking the Order. However, this is all surmising. The fact is that the attack on the adjudication in the instant case is a collateral attack despite counsel for defendant's attempt to label it a direct attack [Tr. p. 58].

In the case of *Huttig Mfg. Co. v. Edwards* (8th Cir. 1908), 160 Fed. 619, which, as here, involved a plenary suit by a trustee in bankruptcy to set aside a voidable preference, the Court stated, on page 622:

> "The manufacturing company attacks the validity of the adjudication that D. Winter was a bankrupt upon the ground that one of the three petitioners in the involuntary proceeding was not a credi-

tor, but *since the attack was made in a proceeding by the trustee to annul a preference it is a collateral, not a direct one.* An adjudication of bankruptcy is entitled to the same verity and is no more to be impeached collaterally than other judgments or decrees of courts of competent jurisdiction. *It cannot be assailed by the defendant in a suit by the trustee to recover or avoid a preference upon the ground that one of the petitioners was not in fact a creditor* of the bankrupt. When the record shows jurisdiction the adjudication of bankruptcy is subject to impeachment only by a direct proceeding in a competent court." (Emphasis added).

Also, in the case of *Teiger v. Stephan Oderwald* (D.C. N.Y. 1940), 31 F. Supp. 626, which also, as here, involved a preference action by a trustee in bankruptcy, the Court stated on page 627:

"The fifth affirmative defense alleges that the petition in bankruptcy is defective in that 2 of the 3 petitioning creditors have no provable claim.—

"The Fifth defense must also fall. There can be no collateral attack upon the adjudication in bankruptcy." [Citing *Huttig v. Edwards, supra*, and *Fairbanks Steam Shovel Co. v. Wills* (1916), 240 U.S. 642 which involved a suit by a bankruptcy trustee to set aside a chattel mortgage].

A similar holding was made in the case of *Ward v. Central Trust Co. of Illinois* (7th Cir. 1919) 261 Fed. 344, which involved a suit by a trustee in bankruptcy to set aside a fraudulent conveyance.

The *Huttig v. Edwards* case, as well as *Teiger v. Stephan Oderwald* case, appear to be "on all fours" with the present case.

C. The District Court's Pre-Occupation With the Validity of the Adjudication Improperly Influenced It to Disregard the Evidence Presented on the Proper Elements to Be Considered in a Preference Action.

(1) The Evidence Conclusively Showed That Thompson Electric Co. Was Insolvent at All Times From and After January 1, 1965.

In examining the evidence presented to the District Court on the issue of insolvency we have the testimony of Mr. Thompson that Thompson Electric Co.'s financial condition remained substantially the same from and after January 1, 1965, until the date of the bankruptcy [Tr. p. 37]; we have the bankruptcy schedules which were attached to the Pre-Trial Conference Order [R-10] and which set forth assets of $36,970.31 and liabilities of $122,498.29; we have the testimony of John Roche that Thompson Electric Co.'s books reflected an insolvent situation at the time of bankruptcy [Pltf. Ex. 4 and Tr. p. 89] as well as on December 31, 1964 [Tr. p. 90]; we have the testimony of Mr. Rothman that the trustee liquidated the assets for $15,968.94 [Tr. p. 68 and Pltf. Ex. 2]. The claims filed against the estate far exceeded that sum [Pltf. Ex. 1] exclusive of Valley Electric's claim of $105,000.00, which was withdrawn.

And finally, and most importantly, we have the Pre-Trial Conference Order itself [R-10] which recites on page 9 line 31 through page 10 line 4 that the balance sheet and profit and loss statement attached thereto "correctly represent the financial condition of Thompson Electric Co. for those dates." The balance sheet [which is the same as Pltf. Ex. 4] reflects a deficit of $120,-

527.91 on June 17, 1965, and a loss of $27,088.59 for the period of January 1, 1965, through June 17, 1965, which means there was a deficit at the beginning of the period of $93,439.92.

This is a matter of admitted fact in the Pre-Trial Conference Order which the trial court, apparently, chose to ignore. The Pre-Trial Conference Order and the Exhibits attached thereto were introduced into evidence as Defendant's Exhibit A [Tr. p. 19].

It is submitted that the above uncontradicted evidence conclusively shows that Thompson Electric Co. was insolvent at all times from and after January 1, 1965, within the meaning of Section 1 (19) of the Bankruptcy Act [Title 11 U.S.C. §1 (19)] which provides:

> "A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at fair valuation be sufficient in amount to pay his debts."

(2) The Uncontradicted Evidence Showed That Appellee Knew or Had Reasonable Cause to Believe That Thompson Electric Co. Was Insolvent.

Section 60(b) of the National Bankruptcy Act [Title 11 §96(b)] provides that in order to recover a preference the trustee must prove:

> "the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent."

It must be noted that actual knowledge is not required. The creditor must only have reasonable cause to believe the bankrupt was insolvent at the time of the transfer.

In Vol. 4 *Remington on Bankruptcy* §1708 the author sets forth the standard of "reasonable cause to believe":

> "The creditor charged with having received a voidable preference has 'reasonable cause to believe' that the debtor is insolvent at the time of the payment or transfer if, at that time, he knew or should have known *from facts brought to his attention, or readily apparent,* that the debtor's financial situation was so precarious *that a man of ordinary prudence would deem him to be insolvent or make further inquiry* before dealing with him as a solvent person. [*Security First National Bank vs. Quittner* (9th Cir 1949) 176 F 2d 997; *In re Steinberg* (D. C. Cal. 1956) 138 F.Supp 462; *In re Beedle Whiton Co.* (D.C. Minn. 1955) 132 F Supp 558]. As stated, actual knowledge of the insolvency is not required to be shown [*Swanson & Sons Poultry Co. vs. Wylie* (9th Cir 1956) 237 F 2d 16]. *The creditor is charged with the knowledge which a reasonably diligent inquiry would disclose".* (Emphasis added).

In the case of *Dudley v. Eberly* (D.C. Ore. 1962) 201 F. Supp. 728, the Court stated on page 732:

> "It is sufficient if a state of facts has been brought to the attention of the creditor concerning the affairs and financial condition of the debtor

which would lead a prudent businessman to conclude that the debtor was insolvent and *a creditor is charged with knowledge which reasonable diligent inquiry would disclose. Swanson & Sons Poultry Co. vs. Wylie* (9th Cir 1956) 237 F 2d 16 —"If Eberly had inquired concerning the other indebtedness, he probably would have learned that the bankrupt's indebtedness was in excess of the reasonable value of its assets. The avoidance of obvious and reliable sources of information will charge the creditor with knowledge he could have obtained from them. *Pittsburgh Plate Glass Co. vs. Edwards* (8th Cir 1906) 148 F. 377, 378." (Emphasis added).

In the instant case appellee called a meeting in January, 1965, "to see what the problem was, why we didn't have our account paid up." [Tr. p. 9]. They went over the bankrupt's receivable and payables [Tr. pp. 9 and 10]. Mr. Thompson told appellee that he would have financial trouble if the Vandenburg job did not materialize, and Mr. Thompson further testified appellee was aware of his present financial difficulties by looking at his receivables and payables [Tr. p. 11]. Mr. Thompson further told appellee in January, 1965, that general business in the Santa Barbara area had been poor for some time [Tr. p. 12]. Appellee's president had been pressing Mr. Thompson quite hard for financial statements during the last few months of the bankrupt's operation [Tr. p. 13]. Mr. Thompson told appellee's officers in January, 1965, that he was having problems meeting his bills [Tr. p. 15]. In January, 1965, the

bankrupt owed appellee about $100,000.00, most of which was past due [Ex. A attached to Pre-Trial Order]. The testimony of appellee's president was that he didn't believe that the bankrupt had assets of $100,000.00 [Pltf. Ex. 3]. Mr. Wallace testified that appellee's president had admitted in May, 1965, that appellee had kept a very close touch on Mr. Thompson's finances [Tr. p. 81].

It is submitted that the foregoing evidence *which is uncontradicted by appellee* (as no evidence whatsoever was offered by defendant below) is more than sufficient to show that a state of affairs existed and was brought to the attention of appellee that would have lead a prudent businessman to conclude that the bankrupt was insolvent or to make further inquiry before dealing with the bankrupt as a solvent person. In other words the evidence clearly shows that appellee had reasonable cause to believe that the bankrupt was insolvent.

(3) Appellee, as a Result of the Transfers Complained of, Received and Obtained a Greater Percentage of Its Claim Than Have or Will Some Other Creditor of the Same Class.

The testimony of Mr. Rothman shows that the trustee has liquidated all assets of the bankrupt and has on hand approximately $11,000.00. The total claims filed against the bankrupt estate total $169,129.76 including $4,792.32 in prior tax and labor claims [Pltf. Ex. 1]. It appears that any dividend to general creditors will not exceed 4%. The transfers to appellee amounted to a great deal more than 4%.

As stated by Mr. Justice Brandeis in the case of *Palmer Clay Products Co. v. Brown,* 297 U.S. 227 at page 229:

> "The petitioner contends that a creditor who receives a part payment of his claim does not receive a preference, although he has reason to believe that the debtor is insolvent, provided the debtor's assets at the time of the payment would, if then liquidated and distributed, be sufficient to pay all the creditors of the same class an equal proportion of their claims.
>
> "Whether a creditor has received a preference is to be determined, not by what the situation would have been if the debtor's assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, but by the actual effect of the payment as determined when bankruptcy results. The payment on account of say 10% within the four months will necessarily result in such creditor receiving a greater percentage than other creditors, if the distribution in bankruptcy is less than 100%.
>
> We may not assume that Congress intended to disregard the actual result, and to introduce the impractical rule of requiring the determination, as of the date of each payment, of the hypothetical question: What would have been the financial result if the assets had then been liquidated and the proceeds distributed among the then creditors?"

VI.
CONCLUSION.

It is therefore respectfully submitted that the Findings of Fact and Conclusions of Law and Judgment of the District Court entered on December 29, 1967, should be reversed and that appellant should have judgment against appellee in the sum of $68,000.00 representing voidable bankruptcy preferences.

Appellant has attempted to point out the unwarranted preoccupation of the District Court with irrelevant issues which improperly influenced the District Court to erroneously decide the real issues so that its decision would not be based solely upon whether the adjudication in bankruptcy was proper. As the District Court stated on page 146 of the transcript:

"Fortunately I don't have to do that."

However, in support of its judgment the District Court determined that the adjudication was "void" and that the appointment of appellant as trustee was "void".

It is difficult to conceive of the confusion and uncertainties of administration in bankruptcy matters that this decision could cause if allowed to remain the law of this Circuit.

What is appellant to do in the administration of the bankrupt estate of Thompson Electric Co. since his appointment is "void" and since the adjudication is "void". Is appellant to return monies on hand to the bankrupt? Is he to seek out the purchasers of the bankrupt's assets and obtain their return? Is he to inform the Referee that his Order has been declared to be void with no hearing before him?

There can be no certainty, and therefore forceful and competent administration of bankrupt estates if receivers and trustees must live with the possibility that adjudications in bankruptcy (or any other Order of a Referee) may be overturned collaterally, at any time or in any Court, or even directly, after said Orders have become final for the purposes of review or appeal. However, if allowed to stand, the District Court's decision herein will bring about exactly that state of affairs for it has made exactly that determination.

Respectfully submitted,

CRAIG, WELLER & LAUGHARN,
By ROBERT A. FISHER,
Attorneys for Appellant.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT A. FISHER